

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN STEVENSON,

Defendant-Appellant.

UNPUBLISHED

April 1, 2003

No. 236306

Kalamazoo Circuit Court

LC No. 01-000154-FC

Before: Schuette P.J. and Sawyer and Wilder, JJ

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321d, and felony-firearm, MCL 750.227b. Before trial, defendant also pleaded guilty to felon in possession of a firearm, MCL 750.224f. He was sentenced as a third habitual offender, MCL 769.11, to 18 to 30 years' imprisonment on the manslaughter conviction, to a concurrent 4 to 10 years' imprisonment on the felon in possession conviction, and to a consecutive 2 years' imprisonment on the felony-firearm conviction. He appeals as of right. We affirm.

I. Facts

This case arises from an early morning shooting in the city of Kalamazoo on August 6, 2000. As defendant and his cousin, James Smith, were walking to Smith's house, an altercation with the decedent occurred. Defendant alleged that the decedent attacked him with mace or pepper spray and the shooting was in self-defense. Defendant returned to the home of his cousin, Angela Pratt. An additional cousin, a William Smith, drove defendant to defendant's residence. The firearm in question was never recovered after being discarded by defendant. A forensic scientist at the trial testified that the decedent was shot three times in the back.

Police arrested defendant for the shooting on January 7, 2001 and read him his *Miranda*¹ rights at roughly 1:45 p.m. Defendant refused to make a statement. A search warrant was executed at defendant's residence where evidence of crack cocaine and weapons were discovered resulting in new charges against defendant. Approximately four hours later, defendant was informed of the new charges against him, was asked if we wanted to make a statement, was

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

given fresh Miranda warnings, acknowledged that he waived his rights both orally and in writing and confessed to the shooting while alleging self defense.

On February 1, 2001 a preliminary examination was held in this case, as a result of which defendant was bound over for trial. On June 8, 2001, at defendant's request, a *Walker*² hearing was held to determine the admissibility of defendant's statements to the police. At the conclusion of this hearing, the trial court ruled that defendant's statements were admissible at trial. At the same time the trial court denied a second motion made by defendant for an out-of-court lineup.

At the conclusion of the trial, and after deliberation, the jury found defendant guilty of the lesser-included offense of voluntary manslaughter and guilty of the charged offense of felony-firearm. Accordingly, on August 13, 2001 defendant was sentenced as indicated above. Defendant now brings this appeal.

II. Admissibility of Evidence

Defendant first argues on appeal that the trial court abused its discretion when it barred testimony from prosecution witness William Slack, who was with the decedent on the night the decedent was killed. Defendant desired that Slack provide testimony regarding the decedent's reputation in the community for robbing people for crack cocaine. Defendant asserts that the trial court; therefore, denied defendant his constitutional right to present a defense. Specifically, defendant argues that the court abused its discretion because this evidence was admissible under MRE 404(a) to show that the decedent was the aggressor in the confrontation in which he lost his life, and to show defendant's state of mind. Further, defendant argues the testimony was admissible under MRE 405(b) because the character of the decedent was at issue in this case. We disagree.

A. Standard of Review

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Moreover, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Cain*, 238 Mich App 95, 123; 605 NW2d 28 (1999).

B. Analysis

MRE 404(a) provides:

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;

(2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor;

(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;

(4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

In practice, MRE 404(a)(2) has been interpreted as permitting evidence of a victim's reputation for violence to be admitted for two purposes: (1) as circumstantial evidence on the question of which party was the aggressor in the affray, and (2) as circumstantial evidence on the question of the defendant's state of mind during the affray. *People v Harris*, 458 Mich 310, 315-317; 583 NW2d 680 (1998); *People v Cooper*, 73 Mich App 660, 664; 252 NW2d 564 (1977).

We first note that at trial defendant never claimed to offer this evidence either to show that the decedent had a violent character, or to show defendant's state of mind at the time he shot the decedent. Instead, the trial transcript reveals that defendant, despite his assertions to the contrary, was attempting to introduce this evidence in order to show the decedent's conformity with his reputation on the night defendant shot him. Defense counsel stated at trial that defendant sought to introduce this evidence in order to establish a foundation for Slack's opinion that decedent was on his way to rob a crack house at the time he crossed paths with defendant. Following the implications of this stated purpose to their logical conclusion, the thought process that defendant is urging upon this Court is as follows: decedent had no money and was coming down from a drug high; decedent had already once that evening been turned away from a crack house that refused to sell to him; decedent had a reputation for robbing people for crack cocaine; therefore, when decedent left Slack sitting in the car in which the two men had been riding, without giving any explanation for his absence, decedent was going to rob the crack house located nearby that had turned him away earlier that night. This is precisely the use of character evidence that MRE 404(a) seeks to bar. Accordingly, we find that this evidence was not admissible under MRE 404(a).

Moreover, we further find that this evidence was also not admissible under MRE 405(b). MRE 405(b) provides:

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

In the first place, MRE 405(b) applies exclusively and explicitly to evidence regarding specific instances of conduct. Yet the evidence that defendant sought to have admitted consisted, instead, of reputation evidence. For this reason this evidence was not admissible under MRE 405(b). Moreover, MRE 405(b) specifically states that evidence of specific instances of a person's conduct is admissible only when the character or a trait of character of that person is an essential element of a charge, claim or defense. In this case, the victim's character was not in issue, because defendant never asserted that the character evidence he proffered was intended to show that the decedent was a violent or aggressive person. We find that Slack's testimony as to the decedent's reputation in the community for committing robberies for crack cocaine also was not admissible under MRE 405(b).

Thus, given that the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), we find that defendant is not entitled to a reversal of his convictions on these grounds.

III. Late Endorsement of Witness

Defendant next argues that the trial court abused its discretion when it denied defendant's motion for a late endorsement of proposed witness William Smith, because defendant had good cause for not knowing of this witness sooner, and because the prosecution would not have been unfairly surprised or prejudiced by this witness' testimony. We disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding the late endorsement of a witness for an abuse of discretion. *People v Sullivan*, 97 Mich App 488, 491; 296 NW2d 81 (1980).

B. Analysis

Discovery in criminal prosecutions is governed by MCR 6.201. MCR 6.201(A) provides, in pertinent part, that a party, upon request, must provide all other parties with the names and addresses of all lay and expert witnesses whom the party intends to call at trial. MCR 6.201(H) holds that if at any time a party discovers additional information or material subject to disclosure under the rule, that party, without further request, must promptly notify the other party. MCR 6.201(I) provides that, on good cause shown, the court may order a modification of the requirements and prohibitions of this rule, while MCR 6.201(J) holds that if a party fails to comply with this rule the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

Defendant argues that he informed the prosecution as soon as he learned of Smith's proffered testimony. However, defendant has failed to offer any explanation as to why defendant could not have discovered this witness earlier. On this basis alone, we believe, the trial court did not abuse its discretion in denying defendant's motion, because defendant clearly failed to demonstrate good cause such as would justify a modification of the discovery rules under MCR 6.201(I). Smith is defendant's cousin, Smith was with defendant at their cousin, Angela Pratt's home on the evening that decedent was shot, Smith was still at Pratt's home when defendant returned there after the shooting, and Smith then gave defendant a ride home. In light of these facts, we find it difficult to believe that defense counsel could not have learned of this witness' testimony earlier than five days into the trial. After all, common sense dictates that Smith was someone whom defense counsel should have exhaustively interviewed, given his proximity to defendant both before and after the relevant events on the date in question. Accordingly, the trial court did not abuse its discretion in denying defendant's motion.

IV. *Miranda* Warnings and Admissibility of Confession

Defendant next argues that the trial court violated his due process rights when it permitted statements that defendant had made to the police in January 2001 to be admitted into evidence. Defendant contends that the police violated his Fifth Amendment right to remain silent by reinitiating questioning on the same crime four hours after defendant asserted his right, and thereby failed to scrupulously honor defendant's invocation of this right. We disagree.

A. Standard of Review

In reviewing a trial court's findings, this Court must examine the entire record and make an independent determination on the issue of voluntariness. However, the trial court's findings will not be reversed unless they are clearly erroneous. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000). Moreover, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Cain, supra* at 123.

B. Analysis

With regard to a defendant's right to remain silent, the United States Supreme Court, in *Miranda v Arizona*, 384 US 436, 473-474; 96 S Ct 321; 46 L Ed 2d 313 (1975), stated as follows:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Subsequently, the Supreme Court clarified the above-quoted passage, stating that *Miranda* could not “sensibly be read to create a per se proscription of indefinite duration” on further questioning after a person in custody asserts the privilege against compelled self-incrimination, and finding, therefore, that the admissibility of statements obtained after the accused has decided to remain silent depends on whether the accused’s right to cut off questioning was scrupulously honored. *Michigan v Mosley*, 423 US 96, 102-103, 104; 96 S Ct 321; 46 L Ed 2d 313 (1975).

In the wake of the Supreme Court’s holdings in these two cases, this Court then further clarified the law concerning when a statement secured after the giving of *Miranda* warnings is admissible. In *People v Catey*, the Court articulated a three part test, holding that once a prisoner has stated that he wishes to remain silent, interrogation may only continue, if the prisoner has not on his own initiative stated that he no longer wishes to remain silent, if: (1) questioning is resumed only after a significant period of time has elapsed, (2) a fresh set of *Miranda* warnings is given, and (3) the subsequent interrogation relates to a crime that was not the subject of the earlier interrogation. *People v Catey*, 135 Mich App 714, 725; 356 NW2d 241 (1984). The court further held that, even if the above criteria were met, the subsequent interrogation could not “have the characteristics of a repeated effort to wear down the resistance of the prisoner and make him change his mind.” *Id.*

Most recently in *People v Slocum*, 219 Mich App 695; 558 NW2d 4 (1997), this Court additionally clarified the law on this question. In *Slocum*, this Court, while stating that the first two criteria set forth in *Catey* could fairly be considered significant factors in assessing the constitutional propriety of the reinitiation of questioning after assertion of the privilege against compelled self-incrimination, found that the third *Catey* criterion, namely that the subsequent interrogation relate to a different crime than the first interrogation, was not essential to scrupulously honoring a defendant’s assertion of the right to cut off questioning. *Id.*, 701-702. Noting that the *Mosley* Court specifically rejected a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, because it would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests, the Court found that the proper inquiry is whether the police scrupulously honored the defendant’s assertion of the right to cut off questioning, and stated that the *Catey* criteria should be considered only to the extent that they are relevant in conducting this inquiry. *Slocum, supra*, 219 Mich App 704.

As noted by the trial court, nearly four hours passed between defendant’s initial assertion of his right to remain silent and the time that the police resumed questioning defendant. Moreover, additional evidence was found as a result of a search warrant executed on defendant’s house during that period, which evidence subjected defendant to additional criminal charges about which defendant rightfully deserved to be informed. Furthermore, defendant was reread his *Miranda* rights before making his statements to the police. All of these factors conform to the criteria set out in *Catey* and *Slocum*, under which interrogation of a defendant may lawfully be reinitiated. This is not a case where defendant was subjected to repeated questioning or badgering. Rather, defendant was interrogated once, his assertion of his right not to incriminate himself was immediately complied with, and defendant was not questioned again until new evidence was uncovered. At that time, defendant was simply asked if he now wished to make a statement, and defendant, by all indications of his own free will, indicated that he did in fact wish

to speak with the police. We believe that, in light of the rules set forth in *Mosley*, *Slocum*, and *Catey*, the trial court did not clearly err in finding that defendant's statements to the police were admissible.

V. Sentencing Guidelines

Defendant's final argument is that the trial court abused its discretion in departing upward from the minimum sentence range set forth in the sentencing guidelines, because the reasons articulated by the court for so doing were not substantial or compelling, and because the trial court's departure constituted a rejection of the jury's finding that the facts supported merely a manslaughter conviction. We disagree.

A. Standard of Review

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law under a de novo standard, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). An abuse of discretion exists when the result was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and the exercise of passion or bias. *Babcock*, *supra* at 76.

B. Analysis

We first note that, because defendant committed his crimes in August 2000, the legislative sentencing guidelines apply to this case. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Under these guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). In addition, the court's reasons for departing must also be objective and verifiable. *Id.*, 78. The phrase "objective and verifiable" has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). Moreover, a court may not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. MCL 769.34.

Keeping in mind that this Court reviews the question of whether a trial court's stated reasons for departure were objective and verifiable under a de novo standard, we believe that the trial court correctly found that there were objective and verifiable reasons for departing from the statutory guidelines. A majority of the factors cited by the trial court in support of its decision to upwardly depart from the guidelines, namely that defendant had used an extremely dangerous weapon, that defendant had fired this dangerous weapon recklessly and randomly in a residential area without regard for the safety of others, that defendant had shot the decedent in the back, that the shots were all located in a very narrow range within a vital part of the decedent's body, that

defendant had fled the scene of the shooting, and that defendant had hid the weapon used in the crime, all were actions or occurrences which were external to the minds of the judge, defendant, and prosecution, and all were capable of being confirmed. Indeed, many of these factors were confirmed by defendant's own trial testimony, while others were confirmed by the testimony of Dr. Waldemar Palutke, the forensic pathologist that performed the autopsy on the decedent. Thus, we find that the trial court correctly found that its reasons for upwardly departing were objective and verifiable.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder